



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 16 1996

MEMORANDUM

SUBJECT: Guidance for Environmental Protection Agency Participation in
Department of Energy FY 1998 Environmental Management Budget
Formulation

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TO: Regional Administrators

I. PURPOSE

This memorandum provides guidance for participation by the Environmental Protection Agency (EPA) in the FY 1998 Department of Energy (DOE) budget formulation process. The purpose is to promote national consistency in EPA's response to the invitation contained in the guidance issued by DOE's Environmental Management (EM) program for participation in the budget formulation process. This memorandum also contains the criteria for consideration of a request from the Department of Energy for revision of affected milestones in existing Interagency Agreements (IAGs) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) based on projected funding shortfalls, notwithstanding the requirements of Executive Order 12088. Additional EPA guidance will be forthcoming to address how to establish milestones during renegotiation of existing agreements (as well as the establishment of milestones in new Interagency Agreements.)



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II. BACKGROUND

A. Department of Energy Budget Formulation

The DOE budget guidance issued by the Environmental Management program provides that stakeholders are to have an "important role" in developing the program. Regulators are considered stakeholders by DOE in this case. However, DOE field offices have discretion to determine the nature and extent of stakeholder participation in the process. The DOE budget guidance states that the "top priority" is to reduce "urgent risks" and that "meeting the terms of our compliance agreements and implementation plans that respond to Defense Nuclear Facilities Safety Board recommendations" is "also critical".

The DOE guidance consists of a 195 page document, including attachments, which has twice been further modified.¹ The DOE budget process is multifaceted and sometimes difficult to understand. Attachment A to this document contains a simplified description, intended only to provide a framework for the EPA response.

B. Considerations Affecting the EPA Response

Protection of human health and the environment is paramount. Existing legal requirements were established to insure their protection and existing Interagency Agreements contain requirements designed to bring agencies into compliance with the requirements of CERCLA. Moreover, Executive Order 12088 imposes on all Federal agencies an affirmative obligation to seek sufficient funding to insure compliance with applicable pollution control standards. In addition, in signing the EPA/DOE model Interagency Agreement, EPA and DOE agreed to a funding provision, which is generally contained in signed IAGs, that states "It is the expectation of the Parties to this Agreement that all obligations of the DOE arising under this Agreement will be fully funded. The DOE shall take all necessary steps and make efforts to obtain timely funding to meet its obligations under this Agreement."

III. THE APPROPRIATE EPA RESPONSE TO THE FY 1998 DEPARTMENT OF ENERGY BUDGET FORMULATION PROCESS

This memorandum outlines a process developed within the context of the existing legal framework for protecting human health and the environment as well as practical limitations

¹ Environmental Management, Guidance for FY 1998 Budget Formulation, November 15, 1995; Addendum to the "Guidance for FY 1998 Budget Formulation" January 31, 1996; Second Addendum to the "Guidance for FY 1998 Budget Formulation", March 18, 1996.

affecting the Regions. The actions are short term because they are to be taken in the context of building the FY 1998 budget, but they should be undertaken with serious consideration given to long term budget and planning needs.

A. Regional Response

The DOE budget guidance provides for stakeholder participation to be tailored to the specific needs of DOE field offices. Similarly, the nature and extent of EPA participation in the process will depend on the specific needs of the Regions, taking into account available time, resources, and skills.

To facilitate a nationally consistent response, to insure the continued integrity and effectiveness of Interagency Agreements, and to contribute to sound decision making, the actions listed below should be taken by each of the affected Regions. These actions include giving serious consideration to stakeholder concerns and consulting with the states with regard to any requested modifications of existing Interagency Agreements. In addition, we believe that close coordination and communication with the states throughout the budget formulation process will enhance the effectiveness of EPA's participation.

1. Advise DOE Field Offices of the continuing importance of compliance with existing Interagency Agreements.

To date, the IAG process has been successful, with EPA, states, and DOE able to mutually agree on appropriate changes in agreements to address problems as they occur. Although the introduction to the DOE budget guidance states that "meeting the terms of our compliance agreements" is critical, some have read other portions of the guidance to permit budget requests that will be inadequate to provide funds necessary to fulfill existing IAG requirements.

Accordingly, in this process EPA should reaffirm that specific provisions of existing IAGs and Executive Order 12088 require that the head of an agency seek sufficient funding for compliance with pollution control requirements. IAG and Executive Order obligations will be met if the budget request forwarded from the Department of Energy to the Office of Management and Budget (OMB) includes a funding request which is sufficient to meet all IAG obligations.²

²Consistent with this approach the Final Report of the Federal Facilities Environmental Restoration Dialogue Committee (April 1996, p.96) states that "...the Committee believes that if

DOE Field Offices should be further advised that if at any point in the budget formulation process it becomes clear that the Secretary's request to the OMB or the President's request to Congress will not be adequate to meet the requirements of a particular compliance agreement, the appropriate Department of Energy official should notify EPA and state regulators of the potentially affected milestones as soon as feasible, in a manner consistent with existing laws and OMB regulations and policies concerning the discussion of budgetary information, so as to enable full and appropriate consideration and joint discussion of the matter. This notification needs to set forth the reasons for the potential shortfall, in order to ensure EPA and state evaluation based on the criteria set out below.

If appropriate, EPA will consider whether to renegotiate the affected milestones. A determination of whether to enter into renegotiations will be made after considering the criteria set forth below. EPA will consult with state regulators in deciding whether to renegotiate the milestones. Normally, revisions to milestones should await Congressional action on appropriations requests and DOE decisions regarding distribution of appropriated funds to the sites; however, EPA, upon evaluation of these criteria, may exercise enforcement discretion for any milestones being considered for renegotiation.

Criteria to be considered by EPA in deciding whether to renegotiate the affected milestones include, but are not necessarily limited to, the following:

- a) impact on human health and the environment
- b) tangible efforts to make up funding shortfalls from reasonable efficiency/productivity sources and the results of such efforts

In this regard, DOE must show concrete efforts to improve efficiency and productivity throughout the budget formulation process. (See also Item 4, cost savings.)

- c) whether funds available for environmental management have been used for cleanup or disproportionately allocated for lower priority purposes other than

the regulators and stakeholders have made a good faith effort but have not succeeded in accommodating federal fiscal constraints in setting cleanup priorities, Executive Branch decision makers above the facility level should request full funding for the environmental cleanup requirements that could not be accommodated within the predetermined budget constraints."

cleanup (such as administrative overhead) and the extent to which efforts have been made to make up shortfalls from alternative sources of funding

d) the extent to which DOE has collaborated and reached agreement with the regulators in establishing priorities and on the relative allocation of funds for DOE's environmental management program

e) availability and use of new technology

f) newly discovered site conditions

g) affirmative and substantive efforts to obtain the viewpoints of stakeholders, including state regulators, regarding the specific IAG changes which are proposed, and

h) any additional factors included in the specific affected IAG.

In particular, and in accordance with the Report of the Federal Facilities Policy Group, "Improving Federal Facilities Cleanup" (October 1995 (hereinafter "Improving Cleanup") p.60) and the "Final Report of the Federal Facilities Environmental Restoration Dialogue Committee" (April 1996 (hereinafter "FFERDC Report") p.96) before asking for changes to milestones, DOE should make up funding shortfalls from reasonable efficiency/productivity sources and to engage in substantive and substantial consultation with stakeholders. Furthermore, IAG requirements should not be renegotiated or waived in response to contractor priorities which are primarily or solely established based on award incentives, where EPA disagrees with the merits of making the change.

EPA, in consultation with the states, and upon evaluation of the criteria described above, may, at its discretion, enter into negotiations on affected milestones. If DOE has met its IAG and Executive Order obligations in seeking funds in its OMB budget submission, but the President's final budget request to Congress does not include these funds, at the appropriate time EPA will be prepared to enter into discussions on how affected milestones can be met through cost-saving measures or rescoping and rescheduling of other activities, and if necessary will renegotiate affected milestones.

2. Consult closely with affected stakeholders and urge clarity in presentation of DOE budget issues to stakeholders.

The DOE budget guidance states that it invites the involvement of representatives of state, local and tribal governments, public and private interests and other "stakeholders" throughout the budget decision making process. Stakeholders are described by DOE as including the "surrounding affected, interested and/or concerned public, labor unions, employees, interest groups, affected Indian Nations, State and local governments, regulatory agencies and Site-Specific Advisory Boards."

EPA Regions must fully understand and seriously consider stakeholder concerns. It may be necessary for EPA to assist DOE in identifying stakeholders who have an important perspective and who should participate in the budget process. Of particular concern is the engagement of stakeholders who may have not been included—for example, those who live downstream from a site, or the natural resources trustee.

In addition, the DOE budget guidance outlines a detailed planning process with its own terminology. To help assure meaningful stakeholder participation, it may be necessary for EPA to encourage DOE to ensure that budget and related information be timely and clearly provided to stakeholders, and that stakeholders be fully involved throughout the process.

3. Submit comments to DOE Headquarters regarding "unresolved or negative" regulator comments.

The DOE budget guidance provides for the submission to DOE Headquarters (HQ) of "unresolved regulator comments", along with the April 15 proposed budget submissions. (Copies are to be provided to the regulators.) While this additional submission should be helpful to DOE HQ in assessing the budget proposals, EPA Regional staff have expressed concerns about its practical limitations. Specifically, time and other pressures may result in inadequate characterization of regulator comments by DOE staff who are also seeking to satisfy a wide range of other requirements.

Therefore, EPA should independently submit its comments regarding "unresolved or negative regulator comments" in connection with the April 15 DOE submissions. The comments should state the assumptions on which they are based. They should be submitted to DOE field offices, and then should be transmitted to DOE HQ through EPA HQ. This submission could occur either concurrently with the April 15 submission, or subsequently, depending upon the circumstances. For example, Regions with particular concerns regarding cost savings may want to wait until the Productivity Improvement Summary is submitted on

April 29. If appropriate, after discussions with DOE HQ, EPA HQ may communicate EPA concerns directly to OMB.

In addition, it is important that EPA's concerns are clearly and frequently communicated to DOE field sites throughout the budget formulation process.

4. Question DOE Field Sites regarding cost efficiencies obtained. Make specific recommendations for additional cost savings.

Throughout the budget formulation process, EPA should focus attention of DOE Field Sites on the identification and implementation of cost efficiencies. Achieving cost savings is consistent with the findings articulated in "Improving Cleanup" and DOE's budget guidance. "Improving Cleanup" provides that Federal agencies should make up funding shortfalls from efficiency/productivity sources; reduce overhead costs; and routinely involve regulators in identifying and monitoring productivity improvements. DOE's budget guidance provides that "[o]perations Offices should continue their efforts to identify cost savings and productivity improvements".

EPA's experience demonstrates the potential impact of cost reduction efforts. For example, in the case of the Environmental Restoration Program at Hanford, as a result of the cooperative efforts of EPA, DOE, and the state regulator, the program was able to achieve an 87% cost reduction (from 490 million to 63 million dollars) for remediation of contaminated soil. The higher costs were the result of inflated volume estimates and overly conservative analytical requirements. EPA expects that Hanford will achieve reductions in groundwater remediation costs as well, due to continuing cooperative efforts. Similarly, at Oak Ridge Reservation, the intimate involvement by DOE management in the costing process has resulted in reductions of projected costs for remedial actions--in the case of the Lower East Fork Poplar Creek, from \$80 million to \$10 million. However, Regions have observed that some DOE Field Offices are focusing inadequate attention on obtaining cost savings and efficiencies. Accordingly, it is vital that EPA continue to press and encourage DOE to obtain improvements in program and contractor efficiency.

5. As time permits, review and comment on Activity Data Sheets and Risk Data Sheets.

DOE Field Offices are to develop priority lists, which in turn are to be used by DOE HQ in making budget decisions. These priorities are to be set based on information contained in the Activity Data Sheets (ADS) and Risk Data Sheets (RDS). The DOE budget guidance contains detailed instructions ("cookbooks") for developing the ADS and RDS.

RDS's, which are new this year, are to be created with input from the Department's stakeholders and withstand a quality assurance review, e.g., "completed within the parameters established in training, instructional, and/or guidance documents." DOE identifies the RDS process as "time-intensive". Furthermore, experience to date indicates that the process can be complex, confusing, and subjective and that EPA's view of risk sometimes differs from DOE's. Experience with the quality control process indicates that obtaining consistency in format does not necessarily ensure "real risks" and "real benefits" are effectively evaluated.

In many cases, EPA will not have the staff necessary to conduct a detailed review of these documents. However, in those cases in which it is feasible, EPA should review and analyze the documents, and question underlying assumptions of the Risk Data Sheet development. EPA's risk assessment process should be considered when making decisions based on risk. In those cases in which an extensive in-depth review is not feasible, it is appropriate to screen the documents to identify matters which may merit special attention.

Furthermore, given the nature and volume of the documentation, in some cases, the length of time allowed for review may be inadequate. Accordingly, it is appropriate for EPA to communicate to DOE Field Sites any concerns regarding the adequacy of the review and comment period.

6. Obtain information which may be helpful to determining the diligence with which DOE seeks to comply with funding requirements contained in existing Interagency Agreements and Executive Order 12088.

The DOE budget guidance provides that information may be made available for discussion during budget development in the Field, including details of budget proposals submitted by DOE field operations offices. However, once the EM budget is submitted to the Secretary of Energy, "all decisions made at Headquarters will remain internal to the Department until the President's Budget is submitted to Congress". During this period, information on other matters such as program priorities, work scope, etc., may be publicly discussed.

Active participation in the budget process may provide information which will be helpful to the Regions in determining the extent to which DOE has complied with the requirements contained in existing IAGs and the Executive Order to seek the funding necessary to comply with existing pollution control requirements. As explained further below, EPA HQ will follow up with DOE to explore how to make this process as smooth as possible.

7. As resources and interest allow, participate in June national stakeholder meeting.

After an internal DOE EM HQ review, but before final decisions are made regarding budget requests to OMB, DOE will convene a "national stakeholder forum" to review the proposed FY 1998 EM budget. EPA HQ will attend to advocate resolution of unresolved EPA issues; and Regions are encouraged to participate in the meeting also.

B. Headquarters Response

EPA Headquarters will support the Regions in the following manner:

1. HQ will reiterate to DOE at the national level concerns about the continued integrity of Interagency Agreements.

2. HQ will consolidate the specific concerns raised by the Regions on issues such as cost efficiencies and "regulator unresolved comments" and raise at the national level.

This effort will include coordination of Regional comments for submission to DOE HQ, participation in the "national stakeholder forum" to advocate resolution of unresolved EPA issues, and a request that DOE share EPA's statements regarding "regulator unresolved comments" with OMB. If appropriate, EPA may communicate its concerns directly to OMB.

3. HQ will support Regions in taking enforcement action for failure to comply with IAG requirements, when such action is merited.

4. HQ will continue to perform a coordination, information, and policy function.

5. HQ will serve as a resource to Regions on the DOE guidance.

6. HQ will analyze and coordinate appropriate resolution of problems identified by the Regions as deterrents to effective participation in the budget formulation process.

During the development of this Guidance, the Regions identified practical limitations on effective participation in the DOE budget process. These include shortages in staffing and resources, the fact that the process is time and labor intensive, and the inadequacy of available information regarding the actual funding for ongoing projects as well as outyear budget projections. The long term usefulness of EPA participation in the budget formulation process

is dependent upon overcoming identified problems, therefore, HQ will work with DOE and within the agency to seek their resolution. Two areas of particular concern to be addressed with the Department of Energy: 1) outcomes demonstrating that EPA input is given serious consideration throughout the decision making process and 2) improved communications between the agencies including following up with DOE to explore with OMB the openness of the federal budget process above the EM level. Specifically, DOE-HQ will discuss opportunities for states and EPA to discuss their perspectives with OMB. With regard to the latter, some Regions have found the lack of information regarding the results of the budgeting and priority setting process, as well as the lack of explanation regarding the reasons certain decisions were made, to be detrimental to successful communication and participation in the process.

If you have any questions regarding this guidance, please call Kathy Seddon of the Office of Enforcement and Compliance Assurance at (202) 564-2573.

Disclaimer:

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The agency may take action at variance with this guidance and its internal implementing procedures.

cc: Regional Counsels, Regions I-X
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Attachment A

SUMMARY DESCRIPTION OF DEPARTMENT OF ENERGY BUDGET PROCESS

(Based on November 15, 1995 Guidance)

NOTE: This summary describes highlights of the budget process only and should not be relied upon as a complete description. Furthermore, the inclusion of this brief description in this Attachment to the Guidance for Environmental Protection Agency Participation in Department of Energy FY 1998 Budget Formulation does not constitute EPA concurrence with the specifics of the DOE internal budget process nor approval of the specific elements of the various budget levels established by DOE. Rather, as described in the body of this Guidance, Executive Order 12088 imposes on all Federal agencies an obligation to seek sufficient funding to insure compliance with applicable pollution control standards.

Department of Energy Field Offices are to develop three budget levels (decrement, target and planning) for submission to DOE Headquarters and establish their priorities through creation of priority lists.

The budget levels are as follows:

The "target" is an amount to be provided by DOE Headquarters. The January 31, 1996 Addendum to the DOE guidance contains estimated targets for DOE sites.

The "decrement" level is 85% of "target".

The "planning" level is the only budget level which provides for full funding necessary to meet "all legal and compliance requirements". It is to be no more than a 10% increase over the target level unless more is needed to meet the legal requirements.

For both the "decrement" and "target" level, DOE is to identify the legal requirements that will not be satisfied at that level of funding.

Separate lists are to be developed for priorities in the following areas: risk impact (previously characterized as risk reduction), compliance, cost effectiveness, and stakeholder concerns. In turn, these are to be consolidated into a final "optimized" priority list. Drafts of the lists were initially due to DOE HQ on February 1, with final versions to be submitted as part of the April 15, 1996 budget submissions.

Activity Data Sheets and Risk Data Sheets are a "key tool for prioritizing these activities". In addition, a "Management Evaluation Matrix" has been created to be used as a "tool for scoring activities and providing input to the prioritization and RDS development process".

While the guidance contemplates an "important role" for stakeholder involvement, it is the DOE sites themselves who determine how to engage stakeholders in the process.

April 15 is the date for submission of proposed budgets and related materials to DOE HQ. Of particular interest to regulators are two submissions:

- * "any unresolved or negative regulator comments related to their proposed budget requests including a list of any additional activities identified by the regulators that cannot be accomplished within target funding levels"
- * "a list of FY 1998 enforceable milestones contained in compliance agreements that may be potentially impacted based on the priorities and the proposed target funding level"

Additional information is to be submitted to DOE HQ on April 29, including a Productivity Improvement Summary.

DOE HQ will conduct a review of the field proposals to insure that field review of technical information was adequate and to analyze the "proposals as a whole based on a national perspective". It should be noted that the underlying documents are subject to revision by Headquarters.

During May, senior EM management will conduct an internal review budget hearing, with a representative of EPA invited to observe. This will be followed by a briefing of stakeholders prior to submission of the final budget proposals to OMB.

A significant change from previous years is that "Programmatic" funding distribution is replaced with a single operations office funding level.